IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

State of Oklahoma, et al. Plaintiffs, vs. Tyson Foods, Inc., et al., Defendants.	**Case No. 4:05-cv-00329-GKF-PJC** **THE CARGILL DEFENDANTS' OBJECTION TO JUNE 2, 2009 OPINION AND ORDER (DKT. NO. 2128)**

Pursuant to Federal Rule of Civil Procedure 72(a), the Cargill Defendants respectfully object to the June 2, 2009 Opinion and Order (Dkt. No. 2128) granting Plaintiffs' Motion to Compel Expert Discovery Regarding Dr. Thomas Ginn (Dkt. No. 2011). As the June 2, 2009 Order applies the law in a novel and erroneous way and sets an unworkable discovery standard, this Court should modify the Order.[1]

BACKGROUND

This dispute regards what happens when a former confidential consulting expert becomes a disclosed testifying expert during the course of litigation. Early in this case and under Rule 26(b)(4)(B)'s safe harbor for non-testifying experts, the Cargill Defendants' counsel hired a preeminent natural resource damage expert, biologist Dr. Tom Ginn, to provide "general consulting advice" using available IRW data. (Ginn Dep. at 182:15 – 184:14: Dkt. No. 2019-2.) At that stage, the Cargill Defendants' counsel engaged two teams of confidential consultants, both of whom were retained through the Exponent consulting firm, which has offices around the

[1] The Cargill Defendants do not object lightly. Indeed, neither they nor any other Defendant has ever objected to a Magistrate Judge's Order in this litigation, whereas Plaintiffs have asserted numerous Rule 72(a) objections. (See Dkt. Nos. 1504, 1659, 1716, 1757.)

world. Dr. Ginn in Arizona headed the "biological issues" consulting team. (Id. at 183:12 – 184:14; 188:16 – 189:23; 208:1 – 210:1.) Another consultant located in a different state and time zone headed the "transport fate source dynamics" ("TFSD") consulting team. (See id. at 208:1 – 216:4.)

Dr. Ginn's biological issues consulting team focused on a defined, narrow task to study certain IRW biological communities (id. at 189:16 – 184:2; 216:5-19), and provide counsel with "biological advice" based on available data (id. at 146:1-7, 163:20 – 164:20). After Plaintiffs disclosed the first in their series of expert liability reports in May 2008 (nearly three years after the litigation began and after Dr. Ginn had been involved as a consultant for more than 2 years) it became clear that Dr. Ginn would need to testify about a narrow focus of his work: the health of fish and benthic macroinvertebrates biological communities, and injury determination. (See id. at 218:8-17.) Dr. Ginn will testify in response to opinions of numerous Plaintiffs' experts, including Drs. Stevenson, Cooke, and Welch who opine on such topics as general ecological conditions in the waters of the IRW and a purported correlation between poultry house density and the health of fish communities and macroinvertebrates in the waters of the IRW and Tenkiller Ferry Lake. Thus Dr. Ginn transitioned from a general consultant to a focused and limited testifying expert.

In addition to Dr. Ginn's roles as first a general consultant and then later a discrete testifying expert, he also served as administrative project manager for Exponent. Dr. Ginn testified that in this administrative role, he oversaw the budgeting and billing for both Exponent projects during the consulting phase. Dr. Ginn was simply the point-of-contact, administrative conduit between the consulting firm and the Cargill Defendants' counsel. (Id. at 182:15 – 183:11; 208:1 – 216:4.) Other than suggesting possible members of the TFSD team and

conducting a few joint presentations with counsel, Dr. Ginn averred that he had **no** involvement in the TFSD team's scope of work, analyses, or work product. (Id. at 208:1 – 216:4, especially 211:4-9: "I was aware of what they were doing, although I was not participating in those analyses and any determinations or any activities they were doing, I was aware in a general sense of what they were doing ….")

All the opinions Dr. Ginn plans to offer at trial are contained in his expert report. (Id. at 321:20 – 322:6.) As the Cargill Defendants have represented to this Court, the general background and preliminary advice Dr. Ginn provided in his consulting role is unrelated to the biological community data that is the subject of his expert opinions. (See generally Dkt. No. 2019.) Further, the Cargill Defendants have averred that they already produced **all** materials related to the biological community data that Dr. Ginn considered in formulating his expert opinions – no matter the timeframe and no matter whether he ultimately rejected the information for inclusion in his report. (Dkt. No. 2019 at 8-9; Dkt. No. 2019-2 Ginn Dep. at 384:22 – 386:2: stating "the redacted information [produced on April 14, 2009] has no relationship to my opinion in this matter.")

> Q. Has all of the data that you gathered up as part of this evaluation been produced as part of your considered materials?
> A. I don't know. The data that – as far as I know, the data that were in our files were turned over to counsel and I'm not absolutely sure that all of that was produced. I just don't know.
> MS. COLLINS: Let me just state on the record that all materials that Dr. Ginn provided to us that had any relationship to the facts or opinions in his expert report have been disclosed.
> MS. BURCH: Okay. I'm specifically asking about any information he gathered. Has that all been produced?
> MS. COLLINS: Yes, yes.
> MS. BURCH: All of the fish and biological information he gathered as part of his initial retention –
> MS. COLLINS: Yes.
> MS. BURCH: – he's been describing, that's all been produced.

MS. COLLINS: Yes, yes.

(Id. at 184:15 – 185:15, emphasis added; see also id. at 187:2 – 188:15.)

The Cargill Defendants do not dispute the general rule of law set forth in the Magistrate Judge's prior decisions of B.H. v. Gold Fields Mining Corp., 239 F.R.D. 652 (N.D. Okla. 2005) and J.B. v. Asarco, Inc., 225 F.R.D. 258 (N.D. Okla. 2004). As the Magistrate Judge has directed, "documents are 'considered' under Rule 26(a)(2)(B) if the expert has 'read or reviewed the privileged materials before or in connection with formulating his or her opinion.'" Asarco, 225 F.R.D. at 261 (quoting Lamonds v. Gen. Motors Corp., 180 F.R.D. 302, 306 (W.D. Va. 1998)). The term "considered" is broader than the term "relied upon," and may include materials the expert "examines but rejects." Id. (emphasis added); see also Gold Fields Mining, 239 F.R.D. at 660 (if a former consulting expert is later designated to testify, he must disclose those materials he considered in forming his disclosed expert opinions). In recognition of Dr. Ginn's evolved expert role, the Cargill Defendants complied with these precedents.

To this end, the Cargill Defendants produced a second set of materials relating to Dr. Ginn on April 14, 2009, just before his deposition.[2] Counsel discussed the substance of the materials on the record, most of which Dr. Ginn has not even seen for years. (Dkt. No. 2019-2 at 187:2–188:15.) The Cargill Defendants averred that they produced to Plaintiffs all materials that Dr. Ginn "examined" or relied upon in formulating the opinions stated in his expert report, in full compliance with Federal Rule of Civil Procedure 26(a)(2)(b). See Asarco, 225 F.R.D. at 261; (see Dkt. No. 2019 at 1-2.) Specifically, the Cargill Defendants provided Plaintiffs all materials

[2] The Cargill Defendants' second production of Dr. Ginn's materials before his deposition was belated. Fully recognizing this, the Cargill Defendants offered to Plaintiffs and committed (twice) to the Court that they would produce Dr. Ginn at a mutually agreeable time and place for a second deposition limited to issues pertaining to the supplemental materials produced on April 14, 2009. (Dkt. Nos. 2014 at 1, 2019 at 2; see also June 2, 2009 Ord. at 2.)

1) that Dr. Ginn had at some point "seen" and that were 2) factually related to the subject matter of Dr. Ginn's reported opinions. (See Dkt. No. 2019 at 2: see also Ginn Dep. at 385:6-8: Dkt. No. 2019-2.) That is, the Cargill Defendants produced everything that Dr. Ginn "read or reviewed … before or in connection with formulating his … opinion." See Asarco, 225 F.R.D. at 261

To maintain the confidentiality of their remaining undisclosed consultants to which they enjoy a right under Rule 26(b)(4)(B), the Cargill Defendants produced some documents to Plaintiffs in redacted form accompanied by a detailed redaction log – an effort undertaken by no other party to this suit. The Cargill Defendants redacted such things as references to the names of undisclosed experts from the separate TFSD consulting team.[3] At Dr. Ginn's deposition, the parties disputed the permissible depth of discovery into Dr. Ginn's consulting work, and contacted the Magistrate Judge by telephone. (Ginn Dep. at 259:23 – 271:23: Dkt. No. 2019-2.) At the Court's direction, the matter was briefed on an expedited schedule and decided without formal argument. (Dkt. No. 1986: Min. Order; Dkt. No. 2017.)

THE JUNE 2, 2009 ORDER

Plaintiffs' underlying motion fundamentally mischaracterized Dr. Ginn's testimony to suggest that he relied on or considered a separate consulting expert's materials in formulating his expert opinion. As the description of Dr. Ginn's role above makes clear, he did not. The Cargill Defendants opposed Plaintiffs' attempted discovery into Dr. Ginn's role as a consulting expert in areas not related to the formation of his expert opinions.

Plaintiffs specifically sought to:

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[3] The Magistrate Judge reviewed *in camera* the unredacted versions of this production set and, as part of the June 2, 2009 Order, directed the Cargill Defendants to remove all redactions. (Dkt. No. 2128 at 15.)

(1) subject Dr. Ginn to a wide-ranging second deposition regarding his former role as a consulting expert and the role and work product of other independent consulting experts who advised the Cargill Defendants' attorneys separate and apart from Dr. Ginn (Dkt. No. 2011 at 1);

(2) obtain all "consulting" documents that Dr. Ginn ever "received" or "generated," regardless of whether they relate to the subject matter of his expert opinions or whether he considered the documents in forming his opinions in this case (id.); and

(3) discover the privileged consulting information of a separate undisclosed expert on a separate subject, which has been redacted from the April 14, 2009 materials and is reflected in the accompanying redaction log (id.).

The Magistrate Judge granted Plaintiffs' motion in its entirety. (Dkt. No. 2128 at 15.)

Under Rule 72(a), this Court should modify or set aside any part of the Magistrate Judge's June 2, 2009 Order that is clearly erroneous or contrary to law. A factual finding "is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Salmeron v. Highlands Ford Sales, Inc., 220 F.R.D. 667, 669 (D.N.M. 2003) (quoting United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948)) (sustaining objection).

1. Analysis Contrary to Law.

The June 2, 2009 Order provides a thorough overview of the shape of this issue across the federal courts, quoting for instance, the Eastern District of Pennsylvania, which "interprets 'considered' in Rule 26(a)(2)(B) as requiring disclosure of all information, whether privileged or not, that a testifying expert 'generates, reviews, reflects upon, reads, and/or uses in connection with the formation of his opinions, even if such information is ultimately rejected.'" (Dkt. No. 2128 at 6, quoting Synthes Spine Co. v. Walden, 232 F.R.D. 460, 462 (E.D. Pa. 2005).) Put differently, "considered simply means to take into account." (Id. at 8, quoting in part Melton v. Encana Oil & Gas (USA) Inc., WL 1468591 at *1 (D. Utah).) The Magistrate Judge refers to this test as the "bright-line" approach under Rule 26(a)(2)(B). (Id. at 3-8.) As the June 2 Order

remarks, the Tenth Circuit Court of Appeals has not adopted the Rule 26(a)(2)(B) bright-line rule. (Id. at 8.)

The Cargill Defendants' dispute with the June 2 Order is not its *adoption* of the bright-line test, but its *erroneous application* of that test in such a way as to cause severe prejudice.[4]

At the outset, the Magistrate Judge committed clear error by choosing not to apply his own published precedents – which the Court went so far as to describe as "the majority view" – on the issue of which party carries the burden of proof. (June 2, 2009 Ord. at 9, n.6; see also id. at 9-10.) The Cargill Defendants followed this majority rule as expressed by the Magistrate Judge's own decisions in Gold Fields Mining and Asarco to argue that Plaintiffs had not met their burden of proving any waiver of the consulting expert privilege. (Dkt. No. 2019 at 4-5.) The Cargill Defendants urged that Plaintiffs, as the party asserting waiver, bore the burden to establish that any waiver of the consulting privilege actually occurred, and that the Court should deny the motion for failing to meet that burden. (Id., discussing Gold Fields Mining, 239 F.R.D. at 655; Asarco, 225 F.R.D. at 658, 261; Johnson v. Gmeinder, 191 F.R.D. 638, 643-44, 648 (D. Kan. 2000).) Contrary to prior authority in this District, the Magistrate Judge erroneously determined that the Cargill Defendants bore the burden of proof and that they had failed to meet this newly imposed burden. (June 2, 2009 Ord. at 9-10, 15.)

Plaintiffs have not and cannot meet their burden show that the Cargill Defendants waived the work product nature of the undisclosed consulting expert materials. As further discussed

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[4] The Magistrate Judge appears to disfavor the disclosure of former consulting experts as testifying experts. The June 2 Order opines that "it is a common trial tactic, particularly in environmental cases, for counsel to retain a consulting expert to review the available evidence and reach preliminary opinions under the protection of Rule 26(b)(4)(B). If those preliminary opinions are not favorable … counsel would not list the consultant as a testifying expert …" (Id. at 9.) The Order also remarks that "[i]f counsel does not want the information disclosed, she need only … decline to morph a consulting expert into an expert witness." (Id. at 7-8.)

below, Dr. Ginn did not consider any of the undisclosed consulting expert work in formulating the opinions in his expert report. As a result, the withheld consulting materials retain their privileged status. It is essential to keep this consulting work confidential, particularly to prevent "unfairness that would result from allowing an opposing party to reap the benefits from another party's effort and expense" and to prevent "a chilling effect on experts serving as consultants if their testimony could be compelled." See Plymovent Corp. v. Air Tech. Solutions, Inc., 243 F.R.D. 139, 143 (D.N.J. 2007).

The Magistrate Judge's refusal to place the burden of proof on Plaintiffs was the first step in an unfair and erroneous analysis. Following Northern District of Oklahoma precedent, the Cargill Defendants expected that the burden of proof would be on Plaintiffs. The Cargill Defendants' response did not include all possible evidence that the Cargill Defendants had met Plaintiffs' burden of proof as to waiver.[5] On this diminished briefing record, the Magistrate Judge announced that the Cargill Defendants had failed to "clearly" prove "the delineation between Dr. Ginn's roles as consultant and testifying expert …." (June 2, 2009 Ord. at 15.) The Court gives no indication as to why it applied this heighten standard of proof rather than the normal preponderance of the evidence standard. (Id.); cf., E. Cleary, McCormick on Evidence 956 (3d ed. 1984) (noting the preponderance standard applies to "the general run of issues in civil cases"); 21B Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5122 (2d ed. 2005) ("The normal burden of persuasion in a civil case requires only that party prove the fact by a 'preponderance of the evidence.'").

[5] To further illustrate the scope of the work that Dr. Ginn did not do, this objection quotes additional sections of his deposition testimony beyond those paraphrased in the underlying brief. Dr. Ginn's entire deposition transcript was Exhibit A to the Cargill Defendants' response. (Dkt. No. 2019-2.)

Third, the Magistrate Judge found that any resulting "ambiguity thus must be resolved in Oklahoma's favor." (June 2, 2009 Ord. at 15, no authority cited.) [6] So, not only did the Court improperly place the initial burden to prove the negative (that they had *not* waived their consulting expert privilege) on the Cargill Defendants, the Court employed an unsupported heightened standard of proof, and then also announced an erroneous rule that "the ambiguity thus must be resolved in [the *moving* party's] favor." (See id.)

The Magistrate Judge explained that "[t]his result is mandated by [underlying] policies" and expresses his opinion – supported only by an unpublished District of Connecticut decision regarding a foreign air crash disaster – that "the party seeking to compel the production of the documents should not have to rely on the resisting party's representation that the documents were not considered by the expert in forming his opinion." (Id., internal quotation marks & brackets omitted, quoting in part In re Air Crash at Dubrovnik, 2001 WL 777433, at *4 (D. Conn. June 4, 2001).) However, that is precisely how the Federal Rules of Civil Procedure are designed. Absent evidence to the contrary, all counsel and courts must accept a party's representation that it is complying with its discovery obligations, and that it has produced all responsive information within its possession. See, e.g., Prokosh v. Catalina Lighting, Inc., 193

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[6] The Cargill Defendants recognize that the Magistrate Judge has previously held that "[i]f the subject of the materials directly relates to the opinion in the expert report, this creates at least an ambiguity as to whether the materials informed the expert's opinion," and that such ambiguities are resolved in favor of disclosure. Asarco, 225 F.R.D. at 261; accord June 2, 2009 Ord. at 11, quoting Monsanto Co. v. Aventis Cropscience, N.V., 214 F.R.D. 545, 547 (E.D. Mo. 2002) (ambiguity rule may apply where "subject matter of those [withheld] materials relates to the facts and opinions the expert expressed in his report").

But here, the materials sought by Plaintiffs are not directly related to Dr. Ginn's report, such that no ambiguity arises. Dr. Ginn's general consulting work and the other consulting team's "transport source fate" work is not remotely related to an examination of the biological data concerning benthic macroinvertebrates and fish. Hence, this Court should uphold the Cargill Defendants' appropriate exercise of privilege over the undisclosed consulting materials.

F.R.D. 633, 637 (D. Minn. 2000); Onwuka v. Fed. Express Corp., 178 F.R.D. 508, 514 n.2 (D. Minn. 1997) (citations omitted). Here, counsel for the Cargill Defendants and Dr. Ginn himself have represented that they have produced all items Dr. Ginn considered in forming his expert opinions. And by "considered," the Cargill Defendants mean: "all information, whether privileged or not, that [Dr. Ginn] generates, reviews, reflects upon, reads, and/or uses in connection with the formation of his opinions, even if such information is ultimately rejected," or that Dr. Ginn "took into account" in forming his expert opinions. (See June 2, 2009 Ord. at 6.)

Finally, it appears that the Magistrate Judge has dropped from the considered materials analysis any inquiry into factual relevance. Rather, one could understand the June 2, 2009 Order to require production of *any* information of which Dr. Ginn is aware that pertains to the litigation generally even it bears no substantive connection to his expert report. Rule 26(b)(4)(A) does not impose such a burden. See, e.g., Asarco, 225 F.R.D. at 259-62.

Indeed, in the Magistrate Judge's prior decision in Asarco, the defendants moved to compel neuropsychological evaluations of all plaintiffs to the litigation, including both sibling and non-sibling plaintiffs who had been dismissed. Id. at 259. The Court concluded that the evaluations of the non-siblings need not be produced as considered materials. Id. at 262. Unlike the dismissed siblings' potential biological relevance for demonstrating the remaining plaintiffs' neuropsychological deficits, "no evidence has been produced indicating that this [non-sibling] information has any relevance to the [expert] opinions." Id. at 261-62.

The confidential consulting materials Plaintiffs seek here are akin to those non-siblings: not relevant to the expert opinion at issue. Materials from Dr. Ginn's prior consulting role – other than those related to the biological community data, which have been produced – are not related to and were not "taken into account" in the formulation of his testifying expert opinion.

Likewise, all the general consulting advice Dr. Ginn provided falls outside the scope of the narrow study of benthic macroinvertebrates and fish detailed in his expert report.

There is a similar disconnect between Dr. Ginn's opinion as a testifying expert and the other consulting team's work. Not only did Dr. Ginn *not* consider the TFSD team's work in forming his opinion, but he never "examined," much less rejected, any of that team's materials. Without providing Plaintiffs with the nature of the other team's consulting work, it is clear from Dr. Ginn's responses to Plaintiffs' questioning that Dr. Ginn did not take into account several elements that are unrelated to his study of biological community data. (See section 2, below.)

2. Clearly Erroneous Findings of Fact.

In addition to applying a clearly erroneous burden of proof and standard of proof that are contrary to law, and employing the clearly erroneous rule that all ambiguities must be resolved in favor of the moving party, the June 2, 2009 Order also rested on a clearly erroneous view of the factual record.

In particular, the Magistrate Judge found that Dr. Ginn "received, reviewed and participated in the presentation of the TFSD team's reports and analytical results" (Dkt. No. 2128 at 1), and that "the Cargill Defendants have not shown that Dr. Ginn neither considered the TFSD team's work nor his general consulting work in forming his expert opinion." To the contrary, as argued in the Cargill Defendants' underlying response and detailed below, Dr. Ginn testified and averred that he had no such substantive role in the work of the separate and distinct TFSD consulting team. (E.g., Dkt. No. 2019 at 8-10; Dkt. No. 2019-2 at 208:1 – 216:4.) As there is no record evidence refuting Dr. Ginn's detailed statements about what he did not do, the Magistrate Judge's findings are clearly erroneous. See, e.g., Salmeron, 220 F.R.D. at 669.

Answering a series of leading questions asked by Plaintiffs' counsel using verbs of her

choice, Dr. Ginn met the bright-line test. As a result, the record reflects that the Cargill Defendants here did prove the negative. Dr. Ginn repeatedly testified that the only aspect of the TFSD's work in which he participated was that pertaining to his biological data work – all of which was disclosed. Dr. Ginn did not address, review, evaluate, or look at any aspects unique to the TFSD team. Specifically, he agreed that did not "evaluate" suspended sediments, temperature, phytoplankton, attached algae, nitrogen levels, aerial hypolimnetic oxygen demand, or bacteria levels data; he did not "evaluate" or "look at" phosphorus concentration levels, phosphorus loads, or dissolved oxygen levels; and he did not "look at" chlorophyll-a levels. (Dkt. No. 2019-2 at 108:1 – 110:11, 195:3 – 196:4.) Dr. Ginn did not "look at" or "evaluate" water quality data (id. at 189:16 – 190:10), or "review" any materials indicating poultry waste application contributes phosphorus to the IRW (id. at 202:3-20). Dr. Ginn further agreed with Plaintiffs' counsel that he did not "undertake to identify" any particular source of phosphorus or to "quantify" sources of pollution in the IRW. (Id. at 182:4-14.) In sum, he did not "evaluate fate and transport in the Illinois River Watershed." (Id.)

While he was "aware in a general sense" of the other ongoing consulting projects, Dr. Ginn did "not participat[e] in those analyses and any determinations or any activities they were doing." (Id. at 210:15 – 211:16.) Dr. Ginn averred that "the discussions were between that team leader and the client as far as the work that they were doing and it was not under my purview to, to approve it." (Id. at 212:1-12.) While Dr. Ginn participated in joint presentations to and meetings with the Cargill Defendants' counsel and a client representative during the early consulting phase, as noted above, his role was limited to his biological subject matter. (See id. at 210:21-25; 383:4 – 384:21.) The Cargill Defendants have already produced to Plaintiffs Dr. Ginn's unredacted powerpoint presentation to the client, and it was marked as an exhibit at his

deposition. (See id.; see also Ginn Dep. Ex. No 5: Dkt. No. 2019-6.)

Dr. Ginn did at one point in his deposition comment that he could not affirmatively state that the April 14 production contained no materials possibly related to his expert report. (See June 2, 2009 Ord. at 14.) However, Dr. Ginn had a limited opportunity to review the documents at issue – documents he had not seen in 3-4 years – before he was questioned about them during the direct examination:

> Q: So on the 14th, which is the day before your deposition, some additional materials were produced to us that were identified as your considered materials. Do you know what was in those considered materials?
>
> A: I briefly looked through those materials that were produced before my deposition.
>
> . . .
>
> Q: Did – is any of the information that you described in the e-mails or otherwise related to the opinions that are contained in your expert report?
>
> . . .
>
> A: Well, there was a – there was a large amount of information there. As I recall, a couple of binders, and although I can't think of any specific items that are directly related to my opinions, I don't think I would be prepared to say that none of it is related to my opinions.

(Ginn Dep. at 185:16-21; 186:15-24: Dkt. No. 2019-2.) After having an opportunity to review the old documents more closely, Dr. Ginn clarified:

> Q And with regard to these documents, based on your review of them earlier and during the break today, is there anything contained in these documents which you relied upon or considered in the formation of your opinions in this case to your knowledge that were not already referenced in your report and produced earlier?
>
> A No. There would not be such a category. There are some documents referenced in here or attached herein that I ended up relying on but those documents, for example, the BUMP reports, were included as part of my considered materials and listed in my expert report.
>
> Q And based on your knowledge of these documents, is there – is it fair to say that all of the information that has been redacted relates to another consulting expert's work and is not related to your opinions in this case?
>
> A That's correct based on my review, the redacted information has no relationship to my opinion in this matter.

(Id. at 385:9 – 386:2; see also id. at 383:4 – 386:4.)

Being generally aware of or having potential access to a separate consulting expert's work is not the factual (or logical) equivalent of reviewing, considering, or relying upon that work – much less using it to formulate opinions. The Cargill Defendants are entitled to use Rule 26(b)(4)'s "safe harbor" for a non-testifying, consulting expert's facts and opinions. Because they have already produced all the Ginn materials to which Plaintiffs are entitled under the Federal Rules, the Magistrate Judge should have denied the motion to compel.

CONCLUSION

For all of these reasons, this Court should modify the June 2, 2009 Order as clearly erroneous and contrary to law.

Date: June 15, 2009

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CERTIFICATE OF SERVICE

I certify that on the 15th day of June, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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s/ John H. Tucker